

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

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VIA ECFS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte Presentation; Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units; MB Docket No. 07-51***

Dear Ms. Dortch:

On October 22, 2007, Mary McManus of Comcast, and James Casserly and the undersigned, of Willkie Farr & Gallagher LLP, met with Michelle Carey, Legal Advisor to Chairman Martin, to discuss issues related to the above-referenced proceeding. Consistent with Comcast's pleadings in this proceeding, we explained that competition to serve MDUs is intense, and that MDU owners and MVPDs strike agreements -- be such agreements exclusive or otherwise -- that in the property owner's judgment benefit the residents of the MDU. We noted that the record reflects substantial support for this view, including most notably from real estate interests, and that even AT&T's "Exhibit A" highlights how such an agreement enabled MDU residents to obtain video service for 35 percent *below* the prevailing price in the community (with discounts of 50 percent on bundled services).¹

Further, we explained that, if the Commission does decide to prohibit exclusives, it should not abrogate or otherwise prohibit the enforcement of existing contracts. We noted that the Commission has historically been reluctant to interfere with existing contracts, even in situations where it had more reason and more legal authority to do so -- most notably in the *Competitive Networks* proceeding.² The Commission's historical reluctance to interfere with existing contracts has been partly out of respect for the investment-backed expectations represented in each individual contract, and the agreements between MVPDs and MDUs are no different.

¹ See Comments of AT&T, MB Dkt. 07-51, at Exhibit A (filed July 2, 2007).

² *Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22983 ¶ 36 (2000).

We further explained that an Order prohibiting the enforcement of a material clause or provision of a contract would be a direct assault on the integrity of voluntary, market-driven contracts. Contracts embody combinations of legally enforceable obligations for the mutual benefit of the contracting parties, and the Commission could not possibly alter (or prohibit the enforcement of) a material term of a contract without jeopardizing the mutuality and security of commitment that are paramount to contracting parties and to all the economic activity these principles make possible. The terms of exclusive access agreements reflect the contracting parties' own assessments of such issues as the investments to be made, the services to be provided, the prices to be charged, and the conditions (such as duration and exclusivity) that are necessary to make the capital outlays and business plan attractive. If any of these terms are not honored, or are abrogated, then the investment-backed expectations of the contracting parties are defeated -- with severe long-term ramifications for capital-intensive businesses like facilities-based broadband services.

We reiterated that abrogating existing contracts would harm consumers, and would be detrimental to competition in the voice and broadband marketplaces. In the shorter term, consumers would be harmed: the Commission cannot reasonably expect that any regulatory interference with existing contracts would leave undisturbed the consumer benefits -- such as discounted prices, dedicated service representatives, and special channels -- that flow therefrom. In the longer term, competition in the voice and broadband Internet marketplaces will be harmed: a decision to abrogate exclusive access agreements would compound the problems caused by the Commission's recent decision in the *Sheetrock Order*³ because cable operators could lose their ability to provide voice and broadband Internet services to MDU residents who choose an alternative video service provider. This is a point that has been made by Comcast and others throughout the course of this proceeding.⁴

We also observed that the inside wiring rules in Parts 68 and 76 are no longer workable in a marketplace in which phone companies provide cable services, cable companies provide phone services, and both provide high-speed Internet. We suggested that updating these rules and eliminating their disparities and anomalies would be a far more productive use of the Commission's time and energy than legislating new rules -- that are unauthorized and unneeded -- regarding MDU access agreements.

³ *Telecommunications Services Inside Wiring, Report and Order and Declaratory Ruling*, 22 FCC Rcd 10640 (2007) (*Sheetrock Order*), appeal pending, NCTA v. FCC, Case No. 07-1356 (DC Cir.).

⁴ See, e.g., Letter from Megan M. Delany, Charter Communications, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 07-51 (filed Oct. 16, 2007).

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In addition, we provided Ms. Carey with a copy of the attached one page summary of Comcast's position.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

/s/ Daniel K. Alvarez
Daniel K. Alvarez
Counsel for Comcast Corporation

Attachments

cc: Ms. Michelle Carey

COMPETITION -- NOT REGULATORY FIAT -- WILL BEST SERVE MDU RESIDENTS

- **Consumers Will Lose If The FCC Interferes In The Competitive Marketplace For Video Services In Multiple Dwelling Units.**
 - There is intense competition to serve MDUs, and consumers are the beneficiaries. In choosing among competing MVPDs, MDU owners can negotiate for benefits such as dedicated service representatives, special channels, and substantial price discounts. Consumers could lose these benefits if the FCC curtails or skews the ability of MDUs and MVPDs to negotiate freely -- and particularly if the FCC abrogates or prohibits the enforcement of existing contracts that are the product of voluntary arm's-length negotiations.
 - When it examined this issue in 2003, the FCC found that exclusive agreements can be pro-consumer and that it should not interfere with the functioning of this marketplace. There is no credible evidence in the FCC record to justify changing this finding or this policy, and no basis for abrogating or nullifying contracts entered into in reliance on the FCC's policy.
- **The FCC Must Respect the Decision of Congress To Leave MDU-MVPD Relationships to Voluntary Negotiations.**
 - In 1984, Congress specifically considered and *declined* to adopt a provision that would have restricted MDU owners' control over the provision of video service on their properties. Congress made the policy choice that consumers would be better served by MVPD-MDU negotiations than by legislative or regulatory fiat. For the FCC to claim that Congress impliedly bestowed authority that it deliberately withheld is simply wrong.
 - Section 628 does not give the FCC blanket authority to regulate all practices affecting the delivery of video services to consumers. Section 628 is focused solely on MVPD *access to video programming* at the wholesale level.
 - The FCC cannot abrogate or prohibit the enforcement of existing contracts that are (a) lawful under state and local law and (b) consistent with previously established Commission policy. To interfere with MVPDs' legitimate investment-backed expectations would create a regulatory "taking," subject to just compensation under the Fifth Amendment. The FCC is duty-bound to avoid construing its authority in ways that create constitutional issues.
- **The FCC's Policies Must Be Neutral as Among Competing MVPDs.**
 - Allowing only some MVPDs to have exclusive access contracts would make no sense. Such discrimination cannot be reconciled with the Commission's view that all consumers in MDUs should have an unfettered choice of MVPDs. And consumers would surely lose if MDU owners cannot drive the best bargain available in the marketplace with any available MVPD.
 - Verizon and AT&T do not need any regulatory favors. Today, traditional cable operators and the ILECs compete on many fronts, but the ILECs come to the video MDU marketplace with significant advantages related to their century-long monopoly in landline phone services. Granting them more "regulatory relief" will impede the ability of other MVPDs to compete to serve consumers in MDUs with competitive video, voice, and broadband Internet services, and will harm those consumers in the long run.